No. 17-1717 & 18-0018

In the Supreme Court of the United States

THE AMERICAN LEGION, *et al.*,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 29 OTHER STATES IN SUPPORT OF PETITIONERS

PATRICK MORRISEY
Attorney General

OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
lindsay.s.see@wvago.gov
(304) 558-2021

LINDSAY S. SEE
Solicitor General
Counsel of Record

ZACHARY A. VIGLIANCO
Assistant Attorney General

Counsel for Amicus Curiae *State of West Virginia*
[additional counsel listed at end]

QUESTION PRESENTED

Whether the Establishment Clause requires the alteration or removal of a 93-year old memorial to American service members who died in World War I solely because the memorial bears the shape of a cross?

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Cases

ACLU v. Mercer Cty.,
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Capitol Square Review & Advisory Bd. v. Pinette,
515 U.S. 753 (1995) 10

Hunt v. McNair,
413 U.S. 734 (1973) 6

Lambeth v. Bd. of Comm'rs of Davidson County,
407 F.3d 266 (4th Cir. 2005) 8

Lemon v. Kurtzman,
403 U.S. 602 (1971) ..... *passim*

Locke v. Davey,
540 U.S. 712 (2004) 4

Marsh v. Chambers,
463 U.S. 783 (1983) 9

McCreary Cty. v. Am. Civil Liberties Union,
545 U.S. 844 (2005) 8, 28

Mount Soledad Mem'l Ass'n v. Trunk,
567 U.S. 944 (2012) 5

Rosenberger v. Rector & Visitors of Univ. of Va.,
18 F.3d 269 (4th Cir. 1994) 7

Rowan Cty. v. Lund,
138 S. Ct. 2564 (2018) 5

Salazar v. Buono,
559 U.S. 700 (2010) 15, 16, 19, 27, 28, 29

TABLE OF AUTHORITIES
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Page(s)

Santa Fe Indep. Sch. Dis. v. Doe,
530 U.S. 290 (2000) 7

School District of Abington Township v. Schempp,
374 U.S. 203 (1963) 9

Smith v. County. of Albemarle,
895 F.2d 953 (4th Cir. 1990) 8

Smith v. Jefferson Cty. Bd. of Sch. Comm'rs,
788 F.3d 580 (6th Cir. 2015) 7

Stone v. Graham,
449 U.S. 39 (1980) 8

Town of Greece, N.Y. v. Galloway,
572 U.S. 565 (2014) 3, 9, 29

Trunk v. City of San Diego,
660 F.3d 1091 (9th Cir. 2011) 17, 27

Van Orden v. Perry,
545 U.S. 677 (2005) ..... *passim*

Wallace v. Jaffree,
472 U.S. 38 (1985) 5, 6

Statutes

10 U.S.C. § 3742 17

10 U.S.C. § 3749 17

10 U.S.C. § 6242 17

10 U.S.C. § 8742 17

TABLE OF AUTHORITIES
(continued)

Page(s)

Pub. L. No. 108-447, 118 Stat. 2809, 3346 (2004) 24

Other Authorities

Abraham Lincoln Online,
http://www.abrahamlincolnonline.org 13

Al Whitaker, *Priceville Honors Veterans, Dedicates New Memorial Park*, WHNT News (Nov. 12, 2012) 26

American Battle Monuments Comm'n,
https://www.abmc.gov 15, 19, 20

Arlington Nat'l Cemetery (military website),
http://www.arlingtoncemetery.mil 12, 20, 23

Arlington Nat'l Cemetery (non-military website),
http://arlingtoncemetery.net 20, 23

Barack Obama White House Archive, *Remarks by the President at a Memorial Day Service* (May 30, 2011),
https://obamawhitehouse.archives.gov/the-press-office/2011/05/30/remarks-president-memorial-day-service 1

Ben Rappaport, *How Many American Troops Are Buried In Foreign Lands?*, NBCNews.com
(May 30, 2016), ...18

Bush White House Archive, *President Bush Honors the Brave and Fallen Defenders of Freedom* (May 26, 2003),
https://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030526-1.html 1

TABLE OF AUTHORITIES
(continued)

Page(s)

Community Information Portal, Bloomington Grove, Texas, http://bloominggrovetx.com 14

Discover South Carolina, State of South Carolina, https://discoversouthcarolina.com 14

The Field of Crosses Memorial Project, https://www.fieldofcrosses.com 20

George L. Mosse, FALLEN SOLDIERS: RESHAPING THE MEMORY OF THE WORLD WARS (1990) 23

The Historical Marker Database, https://www.hmdb.org 13, 26

Historical Marker Project, http://www.historicalmarkerproject.com 23

History.Com, *This Day in History: First National Memorial is Ordered by Congress*, https://www.history.com/this-day-in-history/first-national-memorial-is-ordered-by-congress 11

History of Beckley and Raleigh County, http://jeff560.tripod.com/veterans.html 12

Indiana.gov, State of Indiana, https://www.in.gov/iwm/2359.htm 13

John Ruler & Emma Thomson, WORLD WAR I BATTLEFIELDS: A TRAVEL GUIDE TO THE WESTERN FRONT (2d ed. 2018) 20

John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371 (1996) 7

Kathleen Golden, The Battle Cross, THE SMITHSONIAN (May 21, 2015) 25

TABLE OF AUTHORITIES
(continued)

Page(s)

Lori Tobias, *Coos Bay Vietnam memorial stirs up strong feelings and a bombing over Christian symbolism*, The Oregonian (Aug. 31, 2013) 23

Maryland World War I Military Monuments, https://mht.maryland.gov 21

Michael H. Koby & Ash Jain, *Memorializing Our Nation's Heroes: A Legislative Proposal to Amend the Commemorative Works Act*, J.L. & POL. 99 (2001) ...11

Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992) 7

Monument City Blog, *Peace Cross at the Cathedral of the Incarnation*, http://monumentcity.net/2009/05/18/peace-cross-memorial-baltimore-md/ 21

National Park Service, https://www.nps.gov.....13, 18

National D-Day Memorial, https://www.dday.org.....26

The Nat'l War Memorial Registry, http://www.nationalwarmemorial registry.com.....22, 23, 24, 25, 26

Naval-History.Net, *French Navy World War I*, http://www.naval-history.net/WW1NavyFrenchNYDeaths.htm 22

New York City Dep't of Parks & Recreation, http://www.nycgovparks.org/parks/prospect-park/highlights/19641.....12, 22

TABLE OF AUTHORITIES
(continued)

Page(s)

One Columbia, *South Carolina Holocaust Memorial*, https://www.onecolumbiasc.com/public-art/south-carolina-holocaust-memorial/ 14

Philadelphia Pub. Art, http://www.philart.net 22

Prescot National Cemetery, https://www.revolvy.com/page/Prescott-National-Cemetery 24

Rachael Pacella, *Contributions sought to restore Towson's World War I monument*, The Baltimore Sun (Apr. 6, 2017) 21

Remembering the Fallen, *Flanders Field American Cemetery*, https://www.ww1cemeteries.com/flanders-field-american-cemetery.html 18

Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725 (2006) 5

Stone Sentinels – The Battle of Gettysburg, *Lincoln's Gettysburg Address Memorial*, http://gettysburg.stonesentinels.com 14

U.S. Dep't of Veterans Affairs, *America's Wars*, https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf 18

U.S. Dep't of Veterans Affairs, *National Cemetery Administration*, http://www.cem.va.gov 22, 24

TABLE OF AUTHORITIES
(continued)

Page(s)

U.S. Dep't of Veterans Affairs, *State Summaries*, https://www.va.gov/vetdata/docs/SpecialReports/State_Summaries_Washington.pdf 17

Waymarking.com, http://www.waymarking.com 11, 14, 18, 21, 23, 24, 26

Website of Wentzville, Missouri, http://www.wentzvillemo.org 15

INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

As Americans, we owe an enduring debt to the millions of men and women who serve our country and have died in its defense. In 2003, for instance, President George W. Bush reminded the country that "[a]ll Americans and every free nation on earth can trace their liberty to the white markers of places like Arlington National Cemetery."[2] Or take a Memorial Day address eight years later in which President Obama struck a similar note, emphasizing that although "we can never fully repay" those who laid down their lives on our behalf, we can and must "honor their sacrifice" by "holding their memories close to our hearts."[3]

From our nation's earliest days, one of the ways we have honored this charge is through monuments and memorials—public and private—designed to keep our service members' sacrifices at the forefront of the public mind. The decision below threatens one of those monuments, declaring unconstitutional a war memorial built nearly a century ago in Bladensburg, Maryland that honors 49 soldiers who died overseas during World War I. That "Peace Cross" memorial was built with private funds on then-private land, has been

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than amici contributed monetarily to its preparation or submission. All parties have filed blanket consents to the filing of *amicus curiae* briefs.

[2] George W. Bush White House Archive, *President Bush Honors the Brave and Fallen Defenders of Freedom* (May 26, 2003), https://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030526-1.html.

[3] Barack Obama White House Archive, *Remarks by the President at a Memorial Day Service* (May 30, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/05/30/remarks-president-memorial-day-service.

used exclusively for the secular purpose of honoring those local soldiers, contains secular imagery and allusions, and has since been surrounded by other, entirely secular, memorials to the fallen. Yet because the memorial was built in the shape of a cross, the court below determined that the Constitution requires its destruction or substantial alteration.

The *amici* States—West Virginia, Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming—recognize the important public interest in remembering and memorializing those who have served in our armed forces. They likewise have a profound interest in safeguarding the many public war memorials that, like the Bladensburg cross, have stood within their borders for decades—or longer. And because of the potentially vast ramifications of this decision, the *amici* States have a strong interest in clarity about the Establishment Clause's parameters in future challenges to monuments like these.

SUMMARY OF ARGUMENT

Thirteen years ago, this Court affirmed the constitutionality of a public monument built in the shape of a religious symbol where historic tradition and the monument's specific contex demonstrated that it conveyed a primarily secular message—and thus that it did not offend the Establishment Clauses's purpose. *Van Orden v. Perry*, 545 U.S. 677 (2005). The same history- and context-based analysis that prevailed in *Van Orden* requires reversal of the lower court's decision here.

I. The court below gave *Van Orden* short shrift, choosing instead to apply the three-factor "*Lemon* test," and

paying only lip service to what it called the "*Van Orden* factors." Comm'n'r App. 17a (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). Yet neither the plurality nor concurring opinion in *Van Orden* supports this approach. To the contrary, the plurality expressly rejected the *Lemon* test in this context, and Justice Breyer's concurrence—the fifth vote affirming the monument's constitutionality—emphasized that history, context, and the "underlying purposes" of the First Amendment are the constitutional touchstones in passive-monuments challenges like these. This Court's more recent Establishment Clause precedents demand a similar approach as well: robust analysis of our nation's historical practice and an individual monument's origins and context. See *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014).

II. Considered under this correct analysis, the memorial at issue here—a "Peace Cross" standing in Bladensburg, Maryland that was built nearly a century ago to commemorate local soldiers who fought in World War I—easily survives constitutional scrutiny. *First*, the Bladensburg memorial is far from unique: Monuments across the country and dating throughout our nation's history have frequently used religious imagery and allusions when honoring the sacrifice of veterans and those who died in combat.

Second, crosses are a particularly common symbol in these memorials—and especially in the context of the First World War. Hundreds of war memorials nationwide use crosses as prominent features in their architecture. And like the Ten Commandments monument that survived constitutional scrutiny in *Van Orden*, the mere fact that the cross is a religious symbol does not mean that the First Amendment bars its use in public displays. For the Bladensburg monument, as is the case for many similar memorials, the cross is not only a religious symbol: It also connotes a secular and historic meaning of respect for the dead

and honor for the men and women who serve in combat. Indeed, the historical significance of the cross is particularly resonant here, as the monument's shape was deliberately chosen to evoke the memory of fields of crosses, row upon row, that marked the cemeteries of World War I's fallen.

Finally, the history, use, and context of the Bladensburg memorial itself underscores its constitutionality. Constructed in the immediate aftermath of World War I, the monument's original purpose was to commemorate the deaths of 49 local soldiers who served in that conflict. Over the decades it has been used consistently for civic purposes consistent with that end, and in more recent years it has been surrounded with other war memorials that do not incorporate religious imagery. It had also stood without controvery for more than nine decades, further supporting the conclusion that generations of Marylanders viewed the memorial in light of its secular purpose, and not as an establishment of religion.

ARGUMENT

The First Amendment can often appear at war with itself. Not only do the Establishment Clause and Free Exercise Clause pull at times in opposite directions, see, *e.g.*, *Locke v. Davey*, 540 U.S. 712, 718 (2004), but this Court has recognized tension within the Establishment Clause itself. "Janus-like," Establishment Clause jurisprudence "point[s] in two directions," with one face "look[ing] toward the strong role played by religion and religious traditions throughout our Nation's history," and the other "toward the principle that governmental intervention in religious matters can itself endanger religious freedom." *Van Orden v. Perry*, 545 U.S. 677, 683 (2005) (plurality op.).

It is hardly surprising, then, that division and confusion have grown around the Establishment Clause in recent decades. A procession of commentators and jurists—

including current and former members of this Court—repeatedly lament the muddled state of the law. Last June, for example, Justices Thomas and Gorsuch remarked that "Establishment Clause jurisprudence is in disarray." *Rowan Cty. v. Lund*, 138 S. Ct. 2564 (2018) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari). Their critique echoes dozens that have come before in response to the moving target of modern Establishment Clause jurisprudence. See, *e.g.*, *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944 (2012) (Alito, J., respecting the denial of certiorari) ("Establishment Clause jurisprudence is undoubtedly in need of clarity."); *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (White, J., dissenting) (suggesting the Court "reassess" its Establishment Clause jurisprudence); *id.* at 107 (Rehnquist, J., dissenting) (noting that the Court's "Establishment Clause cases have been neither principled nor unified" and, as a result, many are resolved by "hopelessly divided pluralities."); *ACLU v. Mercer Cty.*, 432 F.3d 624, 636 (6th Cir. 2005) ("[W]e remain in Establishment Clause purgatory."); Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725 (2006) ("It is by now axiomatic that the Supreme Court's Establishment Clause jurisprudence is a mess—both hopelessly confused and deeply contradictory.").

This case is an important opportunity to right the course. The court below focused its analysis primarily on the three-factor test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Yet thirteen years ago, a majority of the Court (across multiple opinions) recognized that *Lemon* is unsuited to Establishment Clause challenges to a public monument like this one, and that the correct framework must instead account for context, history, and the Establishment Clause's purpose. *Van Orden*, 545 U.S. at 686 (plurality op.); *id.* at 699-700 (Breyer, J., concurring). The Court should do now what *Van*

Orden's plurality decision could not: issue clear guidance about the Establishment Clause's meaning for lower courts confronted with challenges to any of the hundreds of monuments similar to the Bladensburg Peace Cross nationwide. And it should make clear that war memorials incorporating religious imagery can be—and often are—consistent with both the First Amendment and the best of our historical tradition.

I. The Constitutionality Of Public Memorials Incorporating Religious Imagery Turns On Their Individual Context And Broader Place Within Our National Tradition.

The fractured interpretative framework that characterizes current Establishment Clause jurisprudence traces to some extent to the middle of the twentieth century. *Wallace*, 472 U.S. at 91-92 (Rehnquist, J., dissenting). The morass noticeably thickened, however, in *Lemon*'s wake. To pass muster under *Lemon*, a challenged law or government practice must satisfy three requirements: It must have a secular purpose, its principal or primary effect must neither advance nor inhibit religion, and it must not foster excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13. Over the years this "*Lemon* test" has been somewhat inconsistently applied,[4] and even when it has been utilized, its reception has been far from sweet. Indeed, it has engendered

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[4] See *Van Orden*, 45 U.S. at 686 (plurality op.) ("Many of our recent cases simply have not applied the *Lemon* test."); *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (describing the three *Lemon* factors as "no more than helpful signposts"); *Wallace*, 472 U.S. at 89 (Burger, C.J., dissenting) ("We have repeatedly cautioned that *Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue, but that it sought only to provide 'signposts.'").

significant judicial and scholarly critique,[5] including from several members of this Court. See, *e.g.*, *Santa Fe Indep. Sch. Dis. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting, joined by Scalia and Thomas, JJ.).

The Court's decision in *Van Orden* provided a chance to reject *Lemon*—and to clarify the proper Establishment Clause standard—in the context of a challenge to a pubic monument containing religious imagery. And rightly understood it should have done just that. Considering a statue of the Ten Commandments resting on the grounds of the Texas State Capitol, *Van Orden*'s plurality opinion declared that, whatever *Lemon*'s fate "in the larger scheme of Establishment Clause jurisprudence," it is "not useful" in passive monument cases. *Van Orden*, 545 U.S. at 686 (plurality op.). Instead, "driven both by the nature of the monument and by our Nation's history," *id.*, the plurality concluded that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause," *id.* at 690. Justice Breyer's concurrence added a fifth vote for this approach. Like the plurality, he emphasized that "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious." *Id.* at 699 (Breyer, J., concurring). And he also declined to apply *Lemon*, explaining that there is "no single mechanical formula that can accurately draw the constitutional line in every case." *Id.* at 699-700. His preferred approach, rather, was a "fact-intensive" assessment, considering a

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[5] See, *e.g.*, *Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 599 (6th Cir. 2015); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 18 F.3d 269, 282 n.30 (4th Cir. 1994), *rev'd*, 515 U.S. 819 (1995); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 425 (1996); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 128 (1992).

monument's "context, history, and the Establishment Clause's purpose." *Id.*

Nevertheless, over a decade of application in the lower courts has shown that *Van Orden* did not succeed in resolving *Lemon*'s status in Establishment Clause challenges like these. For one thing, the Court decided a different Establishment Clause case involving framed reproductions of the Ten Commandments inside two courthouses the same day it decided *Van Orden*—and there a majority of the Court *did* apply *Lemon*. See *McCreary Cty. v. Am. Civil Liberties Union*, 545 U.S. 844 (2005). The contrast of using *Lemon* in only one of these cases—indeed, one that relied primarily on an earlier case that challenged a display of the Ten Commandments in the very different context of a public-school classroom, *id.* at 867 (citing *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam))—should have underscored the Court's deliberate decision to reject *Lemon* when evaluating the constitutionality of "passive monuments." In any event, the Fourth Circuit did not heed this lesson from *Van Orden* and *McCreary*. Its approach was error.

Rather than centering its analysis on the history- and context-based factors *Van Orden* taught were essential in public monuments cases like these, the Fourth Circuit relied on its own precedent that had "consistently applied *Lemon* in religious display cases," then treated *Van Orden* as a mere subsidiary component of that outmoded test. Comm'n App. 17a ("[W]e see fit to apply *Lemon* in this case, with due consideration given to the *Van Orden* factors."). The cases it cited, however—*Lambeth v. Bd. of Commissioners of Davidson County*, 407 F.3d 266 (4th Cir. 2005); and *Smith v. County of Albemarle*, 895 F.2d 953, 958 (4th Cir. 1990)—were both decided before *Van Orden*. This Court's more recent First Amendment precedents cannot support the lower

court's attempt to fit the square peg of *Van Orden* into *Lemon*'s round hole.

After all, the *Van Orden* plurality expressly refused to apply *Lemon* to passive monument challenges like these, relying instead on history and tradition. 545 U.S. at 686 (plurality op.). Justice Breyer's majority-making concurrence also rejected "literal application of any particular test"—including *Lemon*'s—in favor of fact-specific "legal judgment" informed by "the basic purposes of the First Amendment's Religion Clauses." *Id.* at 700, 703 (Breyer, J., concurring). And his approach was heavily informed by Justice Goldberg's earlier concurrence in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), which praised the "carefully and ably framed examination of history" in the Court's analysis, including the fact "that many of our legal, political, and personal values derive historically from religious teachings." *Id.* at 305-06 (Goldberg, J., concurring). In other words, under either the plurality's or the concurrence's framework it is not *Lemon*'s mechanistic test that controls, but a more robust inquiry guided by historic practice, the Establishment Clause's purpose, and the origins, use, and context of the memorial in question.

This approach draws strength from the Court's broader Establishment Clause teachings, as well. In one of its most recent forays into this sphere, the challenge to legislative prayer in *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014), the Court emphasized that "the Establishment Clause must be interpreted by reference to historical practices and understandings." *Id.* at 576 (internal quotation marks omitted). This holding, in turn, was strongly influenced by the Court's earlier decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), which rejected a constitutional challenge to legislative prayer because the practice was so "deeply embedded in the history and tradition of this country." *Id.* at 786. Indeed, even

the endorsement test that Justice O'Connor championed to resolve Establishment Clause disputes emphasized the importance of "the history and context of the community and forum" where a challenged practice takes place. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring) (citations omitted).

It is time to make plain what should have been evident over a decade ago in *Van Orden*: At least in the context of challenges to public monuments and memorials, *Lemon* has no place. The First Amendment demands instead a historically informed and context-sensitive analysis. Under that framework, where a memorial incorporating religious imagery is part of a tradition of similarly themed monuments throughout our country's history—and certainly where its individual origins and context also point toward primarily secular ends—there is no constitutional violation.

II. The Bladensburg Peace Cross Is Fully Consistent With The First Amendment.

Applying the correct, history-driven approach leaves no doubt that the Bladensburg memorial is constitutional. *First*, the Peace Cross is part of a long tradition dating to the Revolutionary War of using religious imagery when establishing monuments to honor those who died defending our country and its ideals. *Second*, the cross specifically has been a near-ubiquitous element in these monuments, symbolizing across time and geography not only religious themes, but commemoration of those who have fallen in combat. *Finally*, the origins and context of the Bladensburg cross itself confirm its place within this tradition—and secure its constitutional footing for generations to come.

A. The Bladensburg Memorial Is Part Of A Long Tradition Of Public War Memorials Incorporating Religious Imagery And Themes.

America has been commissioning public monuments and war memorials since its earliest days. Indeed, nearly six months before the Declaration of Independence was signed, the Continental Congress ordered construction of a memorial for Major General Richard Montgomery, who had died leading a recent effort to invade British-controlled Canada—and that memorial was eventually installed on the premises of a church in New York City.[6] From battlefields across the country to state capitols and town squares, war memorials serve as historic touchstones. They tie the past to the present, serving as a place of healing, a space to thank and honor the dead, and, for future generations, "a repository for a collective social and cultural memory." Michael H. Koby & Ash Jain, *Memorializing Our Nation's Heroes: A Legislative Proposal to Amend the Commemorative Works Act*, J.L. & POL. 99, 134 (2001) (citations omitted). An examination of this historical record makes clear not only that our country has a long tradition of remembering soldiers through monuments and memorials, but also that religious architecture plays an important role in a great many of these public spaces.

Consider Arlington National Cemetery. An inscription on the Tomb of the Unknown Soldier— perhaps the most revered and well-known war memorial in the country—reads "Here

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[6] See History.Com, *This Day in History: First National Memorial is Ordered by Congress*, https://www.history.com/this-day-in-history/first-national-memorial-is-ordered-by-congress; see also Waymarking.com, *Major General Richard Montgomery St. Paul's Chapel*, http://www.waymarking.com/waymarks/WMNCQ5_Major_General_Richard_Montgomery_St_Pauls_Chapel_New_York_City_NY.

Rests In Honored Glory An American Soldier Known But to God."[7] Another memorial on Arlington's grounds, dedicated to female nurses who served during the Spanish-American War, displays a prominent Maltese cross; still another, also dedicated to those who served in the Spanish-American War, is inscribed, "To The Glory Of God And In Grateful Remembrance Of The Men And Women Of the Armed Forces Who In This Century Gave Their Lives For Our Country That Freedom Might Live."[8]

Other examples of memorials containing religious imagery and allusions abound. They exist in large metropolises—New York City's Prospect Park, for instance, contains a memorial to those who died in the Battle of Long Island during the Revolutionary War that is etched with George Washington's words, "My God, What Brave Fellows I Must This Day Lose!"[9] They are also found in the tiniest towns, such as 1,815-person Coal City, West Virginia, which boasts a veterans memorial giving thanks that "[b]y the grace of God, some [soldiers] returned to a grateful Nation," and urging that "[a]ll who pass this way praise God for the valiant service" of those who did not.[10] They may be massive—like the 100-foot tall obelisk in Indianapolis's Veterans Memorial

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[7] Arlington Nat'l Cemetery, *The Tomb of the Unknown Soldier*, http://www.arlingtoncemetery.mil/Explore/Tomb-of-the-Unknown-Soldier.

[8] Arlington Nat'l Cemetery, *Spanish-American War Monument*, https://www.arlingtoncemetery.mil/Explore/Monuments-and-Memorials/Spanish-American-War-Nurses-Monument.

[9] New York City Dep't of Parks & Recreation, *Prospect Park, Maryland Monument*, http://www.nycgovparks.org/parks/prospect-park/highlights/19641.

[10] History of Beckley and Raleigh County, *Views of the Raleigh County Veterans Memorial*, http://jeff360.tripod.com/veterans.html.

Square emblazoned with bas-reliefs of Moses carrying the Ten Commandments and a woman praying before a Celtic cross.[11] Or they may be more modest, like the approximately 10-foot-tall marker outside the county courthouse in Elkins, West Virginia, which honors World War II veterans with the following message: "O God, we trust in thee: Let us not be ashamed in this solemn hour of human history. Increase our abiding faith in the deep and holy foundations which our forefathers laid. May we honor those who died in this war by building on the foundation of thy abiding peace."[12]

And perhaps most importantly, they have been built to honor those who fought in wars spanning our nation's history. Post-Civil War monuments were often emblazoned with the famous passage from Lincoln's Gettysburg Address—"that we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom."[13] These words are found today not only at sites like the Lincoln Memorial[14] and a memorial at the Gettysburg

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[11] Indiana.gov, *Indiana War Memorial, Veterans Memorial Plaza*, https://www.in.gov/iwm/2330.htm; Indiana.gov, *Indiana War Memorial, Obelisk Fountain*, https://www.in.gov/iwm/2359.htm.

[12] The Historical Marker Database, *Randolph County Veterans Memorial*, http://www.hmdb.org/marker.asp?marker=33562.

[13] Abraham Lincoln Online, Speeches & Writings, *The Gettysburg Address*, http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm.

[14] National Park Service, *Lincoln Memorial Inscriptions*, https://www.nps.gov/linc/learn/historyculture/Inscriptions.htm.

battlefield,[15] but on State capitol grounds, too, like West Virginia's.[16]

Many World War II memorials offer poignant examples of imagery on a monument assuming cultural meaning beyond its religious origin. Take, for example, the large Star of David monument in Columbia, South Carolina, which is dedicated to the victims and liberators of the Holocaust's concentration camps.[17] Situated among six other large monuments, the very shape of this veterans and Holocaust memorial is a key symbol of Judaism. Yet rather than promoting a particular religious tradition, the memorial's other features make plain that its purpose is to honor those who died in one of history's greatest atrocities, including the etched exhortation to "REMEMBER," and the words "In Sacred Memory of the 6,000,000."[18]

The aesthetics of many modern veterans' memorials are no different. In Blooming Grove, Texas, for example, a memorial to soldiers who fought in the Korean and Vietnam Wars quotes the Old Testament Book of Ecclesiastes: "Rejoice, O Young

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[15] Stone Sentinels – The Battle of Gettysburg, *Lincoln's Gettysburg Address Memorial*, http://gettysburg.stonesentinels.com/other-monuments/lincolns-gettysburg-address-memorial/.

[16] Waymarking.com, *West Virginia Civil War Memorial- Charleston*, http://www.waymarking.com/waymarks/WM8FE1_West_Virginia_Civil_War_Memorial_Charleston_West_Virginia.

[17] Discover South Carolina, *Memorial Park*, https://discoversouthcarolina.com/products/823; One Columbia, *South Carolina Holocaust Memorial*, https://www.onecolumbiasc.com/public-art/south-carolina-holocaust-memorial/.

[18] *Id.*

Men, in Thy Youth."[19] In Wentzville, Missouri, a granite Vietnam War memorial repeats the words "[w]hither thou goest I will go" from the Book of Ruth.[20] And the Honolulu Memorial at the National Memorial Cemetery of the Pacific—built in 1963 to honor soldiers who died in World War II, Korea, and Vietnam—includes a prominent dedication stone at the base of its grand staircase that reads, "In these gardens are recorded the names of Americans who gave their lives in the service of their country and whose Earthly resting place is known only to God."[21]

The primary purpose of these and many other memorials like them is not to promote any particular religious tradition or sect, but to solemnize the sacrifices that the members of our armed forces have made. Cf. *Salazar v. Buono*, 559 U.S. 700, 721 (2010) (plurality op.); *id.* at 724-25 (Alito, J., concurring). The World War I memorial in Bladensburg, Maryland stands firmly within that tradition.

B. There Is A Deep-Seated Tradition Of Using Crosses, Specifically, In Public War Memorials.

The Peace Cross also rests on sound historical ground because its shape—a cross—has throughout our history taken on a meaning beyond religion as a symbol of collective grief and respect for the dead. Indeed, among the hundreds of veterans' memorials nationwide that incorporate religious

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[19] Community Information Portal, *Blooming Grove City Park & War Memorial*, http://bloominggrovetx.com/wp-content/uploads/2014/08/27-IMG_7084.jpg.

[20] Wentzville\Missouri, *Vietnam Veterans Memorial*, http://www.wentzvillemo.org/visitors/Vietnam_war_memorial/.

[21] American Battle Monuments Comm'n, *Honolulu Memorial – National Cemetery of the Pacific*, https://www.abmc.gov/cemeteries-memorials/americas/Honolulu-memorial.

imagery, the cross is one of the most common markers in this landscape.

To be sure, the cross shape of the Bladensburg memorial—the product of decisions made nearly a century ago by members of the community where it stands—has obvious religious connotations. See, *e.g.*, *Salazar*, 559 U.S. at 725 (Alito, J., concurring) ("The cross is of course the preeminent symbol of Christianity"). Yet war memorials have historically co-opted religious imagery for the secular purpose of remembering the men and women who fight and die for our country. This meaning—a "secular moral message" or "historical message" in Justice Breyer's words, *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring)—weighs heavily in the proper Establishment Clause analysis. After all, the monument at issue in *Van Orden* also depicted an undeniably religious theme: the Ten Commandments. See *id.* at 700, 690 (plurality op.). The Court found no constitutional violation in allowing the monument to stand on the Texas State Capitol grounds, however, because it was not *only* religious: "In certain contexts" the Ten Commandments "convey not simply a religious message but also a secular moral message," and it is this "fact that helps to explain the display of those tablets in dozens of courthouses throughout the Nation, including the Supreme Court of the United States." *Id.* at 701 (Breyer, J., concurring).

So too here. "In certain contexts," such as when it is used in a memorial intended to honor fallen soldiers, a cross conveys not only a religious message, but a secular and historical message as well—one of respect for those who served, and a call to remember their sacrifice. And as discussed further below, this historical significance is only amplified in the context of World War I memorials, given the cross's deep association as a symbol of remembrance of those who died in that particular conflict. In other words, when

considered in light of the historical (and indeed, continuing) cultural context that views crosses as a symbol of death and memory, there is no government endorsement of religion in a memorial that, like the one at issue here, bears the shape of a cross.

And also as in *Van Orden*, the broader cultural meaning of crosses as an image in war memorials helps explain their prevalence in public monuments around the country and throughout our history. In contrast to the "dozens" of examples referenced in Justice Breyer's *Van Orden* concurrence, however, here there are hundreds of examples of using a cross to honor combat veterans and those killed in action.

As of 2011, there were 114 monuments commemorating the Civil War alone that included a cross. See *Trunk v. City of San Diego*, 660 F.3d 1091, 1100 (9th Cir. 2011) (Bea, J., dissent from denial of rehearing *en banc*) (citing case record). More generally, there are at least 242 national and state cemeteries honoring U.S. veterans that are managed or recognized by the federal Veterans Administration;[22] many have memorials that include a cross, and nearly all include crosses on at least some of their burial markers. And even on official military insignia and medals, crosses have long been a mark of both bravery and death: A cross denotes heroism on, for example, the Army's Distinguished Service Cross, the Navy Cross, the Air Force Cross, and the Distinguished Flying Cross. 10 U.S.C. §§ 3742, 6242, 8742, 3749.

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[22] See U.S. Dep't of Veterans Affairs, *State Summaries*, https://www.va.gov/vetdata/docs/SpecialReports/State_Summaries_Washington.pdf.

Individual examples are plentiful too. A 12-foot tall cross, for instance, can be found along the trail of the Chickamauga Battlefield in Georgia, dedicated to the memory of a messenger who fell while delivering a message between Union generals.[23] Then there is the Gettysburg battlefield itself in Gettysburg National Military Park, which is home to the Irish Brigade Monument—comprised of a tall stone Celtic cross.[24]

The use of crosses on war memorials expanded significantly in the wake of the First World War. At its time, that war was the most deadly international conflict in American history.[25] And unlike in modern combat, the vast majority of the tens of thousands of American soldiers who died overseas were not brought home, but were laid to rest in Europe's battlefields.[26] Their deaths were frequently marked with crosses, and the sheer magnitude of the casualties often resulted in a visual sea of these markers.[27]

Speaking to this tradition in an opinion concerning a cross built by World War I veterans in the Mojave National

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[23] Waymarking.com, *Chickamauga National Military Park, Lieutenant George W. Landrum Monument*, http://www.waymarking.com/waymarks/WMDRWM_Lieutenant_George_W_Landrum_Monument_Chickamauga_National_Military_Park.

[24] National Park Service, *The Irish Birgade Monument at Gettysburg*, https://www.nps.gov/ner/photosmultimedia/photogallery.htm?id=C795B0CC-155D-451F-67B745EEEA69A02E.

[25] U.S. Dep't of Veterans Affairs, *America's Wars*, https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf.

[26] See Ben Rappaport, *How Many American Troops Are Buried In Foreign Lands?*, NBCNews.com (May 30, 2016), https://www.nbcnews.com/news/us-news/how-many-american-troops-are-buried-foreign-lands-n580951.

[27] See, *e.g.*, Remembering the Fallen, *Flanders Field American Cemetery*, https://www.ww1cemeteries.com/flanders-field-american-cemetery.html.

Preserve, Justice Kennedy explained that "one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten." *Salazar*, 559 U.S. at 721 (plurality op.). Justice Alito echoed this sentiment in the same case, explaining that "for those with searing memories of The Great War, the symbol that was selected, a plain unadorned white cross, no doubt evoked the unforgettable image of the white crosses, row on row, that marked the final resting places of so many American soldiers." *Id.* at 725 (Alito, J., concurring).

Many of these battlefields-turned-cemeteries remain today. For example, the United States currently maintains over two dozen cemeteries overseas, nearly all of which contain a singular symbol: row upon row of Latin crosses.[28] John McCrae's poem *In Flanders Fields* reflects the way these images seeped into the public consciousness: "In Flanders Fields the poppies blow, between the crosses row on row."[29] Even now, an American-built chapel stands in the Flanders Field cemetery, adorned with biblical quotations and other religious themes.[30] The cemetery itself is comprised of white Latin crosses for the vast majority of the dead, and each unknown grave is marked with a cross and the inscription,

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[28] *See* American Battle Monuments Comm'n, *World War I*, https://www.abmc.gov/cemeteries-memorials.

[29] See James Marsh & Richard Foot, *In Flanders Field*, Encyclopedia Britanica, https://www.britannica.com/topic/In-Flanders-Fields.

[30] *See* American Battle Monuments Comm'n, *Commemorative Sites Booklet* 3 (Feb. 2018), https://www.abmc.gov/sites/default/files/publications/EN_997_020_ABMC-Commemorative-Sites-Booklet-MAR2018_508.pdf.

"Here Rests in Honored Glory an American Soldier Known But to God."[31]

Such scenes did not fall by the wayside at World War I's end. Families and communities affected by the war frequently erected cross monuments to remember their loved ones.[32] This ethos followed returning troops home too, and is reflected in the many public cross displays that remember World War I's dead.[33] For instance, Arlington National Cemetery contains two cross memorials commemorating World War I soldiers: the 13-foot high Argonne Cross, built by the American Women's Legion,[34] and the 24-foot high Canadian Cross of Sacrifice, donated by the Canadian government in memory of American soldiers who joined the Canadian army before America entered the war.[35]

Many similar World War I cross memorials stand throughout the county—including those, like the Peace Cross, that take the shape of this enduring symbol of that conflict. In

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[31] *Id.* at 15.

[32] John Ruler & Emma Thomson, WORLD WAR I BATTLEFIELDS: A TRAVEL GUIDE TO THE WESTERN FRONT 104 (2d ed. 2018) ("orderly rows of 15,000 crosses" remember the lives of German and English soldiers killed at Verdun); American Battle Monuments Comm'n, *Meuse-Argonne American Cemetery*, https://www.abmc.gov/cemeteries-memorials/europe/meuse-argonne-american-cemetery.

[33] See, *e.g.*, The Field of Crosses Memorial Project, https://www.fieldofcrosses.com/our-organization/about-us/.

[34] Arlington Nat'l Cemetery, *Argonne Cross Memorial*, http://arlingtoncemetery.net/argonne-cross.htm.

[35] See Arlington Nat'l Cemetery, *Canadian Cross of Sacrifice*, http://www.arlingtoncemetery.mil/Explore/Monuments-and-Memorials/Canadian-Cross; see also ArlingtonCemetery.net, *The Canadian Cross Of Sacrifice At Arlington National Cemetery*, http://arlingtoncemetery.net/canadian-cross.htm.

fact, the Bladensburg memorial is one of at least four cross monuments built to commemorate World War I that can be found in Maryland alone. All four were erected in the 1920s and specifically located at crossroads, "so that all who pass may be reminded of the patriotic and devoted service of our glorious dead."[36] Two of these crosses are in Baltimore: One is a six-foot-tall cross near the Johns Hopkins Hospital "[d]edicated to the glory of God and in reverent memory of the men and women of this community who served their county in all wars";[37] the other is a large Celtic cross "dedicated to the memory of lives lost in World War I" on the grounds of a church near John Hopkins University.[38] The final is a granite wayside cross in Towson, where its citizens inscribed it with the biblical phrase, "Greater love than this hath no man."[39]

Moving beyond Maryland, a 12-foot granite cross honoring the twenty-five French sailors who died serving in American waters sits in Cypress Hill National Cemetery in

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[36] Maryland Historical Trust Inventory, *Towson Wayside Cross* (Feb. 1997); see also Maryland World War I Military Monuments, https://mht.maryland.gov/documents/PDF/monuments/MMM-Inventory-WWI.pdf.

[37] Waymarking.com, *Non-Secular Stone Cross Memorial - Baltimore, MD*, http://www.waymarking.com/waymarks/WM4AC8_Non_Secular_Stone_Cross_Memorial_Baltimore_MD. Although Maryland's official records do not identify when this monument was completed, it appears to date to the same era as the other four.

[38] Monument City Blog, *Peace Cross at the Cathedral of the Incarnation*, http://monumentcity.net/2009/05/18/peace-cross-memorial-baltimore-md/.

[39] See Rachael Pacella, *Contributions sought to restore Towson's World War I monument*, The Baltimore Sun (Apr. 6, 2017), https://www.baltimoresun.com/news/maryland/baltimore-county/towson/ph-tt-wayside-cross-0406-20170406-story.html.

Brooklyn, New York.[40] Also in New York, World War I chaplain-soldier Father Francis Duffy is honored by a bronze monument in his likeness—holding his Bible, dressed in military garb, and standing before a 17-foot tall Celtic cross.[41] Similarly, a stone cross honoring the State's World War I veterans sits on a median between two streets in Augusta, Georgia.[42] A large stone Celtic cross outside Philadelphia is dedicated to the "loving memory of the men of Chestnut Hill and Mt. Airy who died in the World War, France, 1918."[43] And in Waterbury, Connecticut, the Great War For Democracy Memorial was originally a close replica of the wooden crosses clustered by battlefield trenches. Modified over the years, this memorial now includes three wooden crosses dedicated to local soldiers who died in the war, Star of

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[40] U.S. Dep't of Veteran Affairs, *National Cemetery Administration, Cypress Hills National Cemetery*, http://www.cem.va.gov/cems/nchp/cypresshills.asp; see also Naval-History.Net, *French Navy World War I*, http://www.naval-history.net/WW1NavyFrenchNYDeaths.htm.

[41] New York City Dep't of Parks & Recreation, *Father Duffy Square*, http://www.nycgovparks.org/parks/father-duffy-square/monuments/416.

[42] The Nat'l War Memorial Registry, *Troop K Georgia Cavalry War Memorial Front*, http://www.nationalwarmemorialregistry.com/joomla/war-memorial-registry-search/georgia/troop-k-georgia-cavalry-war-memorial-front.

[43] Philadelphia Pub. Art, *Chestnut Hill and Mt. Airy World War I Memorial*, http://www.philart.net/art/Chestnut_Hill_and_Mt_Airy_World_War_I_Memorial/515.html; see also The Nat'l War Memorial Registry, *Chestnut Hill and Mt. Airy World War I Memorial Dedication Stone*, http://www.nationalwarmemorialregistry.com/joomla/war-memorial-registry-search/pennsylvania/chestnut-hill-and-mt-airy-world-war-memorial-dedication-stone.

David plaques remembering Jewish soldiers,[44] a large central illustration of a soldier kneeling before a cross, and an inscription from the Book of Ecclesiastes.[45]

After World War I, crosses continued to proliferate as the symbol of fallen soldiers on public monuments. At Chaplain's Hill in Arlington National Cemetery, a 1989 monument dedicated to Catholic chaplains slain in many wars bears a bronze crucifix and a plaque entreating, "May God Grant Peace To Them And To The Nation They Served So Well."[46] In Coos Bay, Oregon, a 5 1/2-foot tall cross honors "the men who gave their lives" in the Vietnam War.[47] On the grounds of the county courthouse in Mount Vernon, Illinois, there is a large granite pillar etched with a prominent cross bearing tribute to the veterans of eight wars.[48] A cross sits atop a

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[44] Historical Marker Project, *Great War For Democracy Memorial*, http://www.historicalmarkerproject.com/markers/HMO2O_great-war-for-democracy-memorial_Waterbury-CT.html; The Nat'l War Memorial Registry, *Great War For Democracy Memorial Main Panel*, http://www.nationalwarmemorialregistry.org/memorials/great-war-for-democracy-memorial-main-panel/.

[45] George L. Mosse, FALLEN SOLDIERS: RESHAPING THE MEMORY OF THE WORLD WARS 83 (1990).

[46] Arlington Nat'l Cemetery, *Chaplains Hill & Monuments*, http://www.arlingtoncemetery.mil/Explore/Monuments-and-Memorials/Chaplains-Hill; ArlingtonCemetery.net, *The Catholic Chaplain's Monument at Arlington National Cemetery*, http://arlingtoncemetery.net/catholic.htm.

[47] Lori Tobias, *Coos Bay Vietnam memorial stirs up strong feelings and a bombing over Christian symbolism*, The Oregonian (Aug. 31, 2013), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2013/08/coos_bay_vietnam_memorial_stir.html.

[48] Waymarking.com, *Jefferson County Veterans Memorial ~ Mount Vernon, IL*, http://www.way

Vietnam War memorial in La Mesa, California,[49] and another tops the Unknown Soldiers Monument at Arizona's Prescott National Cemetery.[50] Langdale, Wisconsin is home to a plain wooden cross memorializing the dead of all wars.[51] In San Diego, the Mt. Soledad Veterans Memorial Cross honors all "veterans of the United States Armed Forces."[52] And in Aurora, Missouri, a stone cross reminds visitors to Maple Park Cemetery of "those who paid the ultimate sacrifice."[53]

Borrowing imagery even more directly evocative of the World Wars, many towns have also constructed fields of crosses to honor the dead. In Mount Morris, New York, for example, a field of small crosses is patterned after those found

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marking.com/waymarks/WM625Y_Jefferson_County_Veterans_Memorial_Mount_Vernon_IL.

[49] Waymarking.com, *Vietnam War Memorial, La Mesa, CA*, http://www.waymarking.com/waymarks/WM8WQX_Vietnam_War_Memorial_La_Mesa_CA.

[50] U.S. Dep't of Veteran Affairs, *National Cemetery Administration, Prescott National Cemetery*, http://www.cem.va.gov/cems/nchp/prescott.asp; Prescot National Cemetery, https://www.revolvy.com/page/Prescott-National-Cemetery.

[51] The Nat'l War Memorial Registry, *American Legion Post 524 War Memorial Cross*, http://www.nationalwarmemorialregistry.com/joomla/war-memorial-registry-search/wisconsin/american-legion-post-524-war-memorial-cross.

[52] Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 3346 (2004).

[53] The Nat'l War Memorial Registry, *Maple Park Cemetery War Memorial Cross*, http://www.nationalwarmemorialregistry.com/joomla/war-memorial-registry-search/missouri/maple-park-cemetery-war-memorial-cross.

at Omaha Beach in Normandy.[54] In Highland, Kansas, a local cemetery marks similar rows of crosses with the names of individual soldiers.[55] In Constantine, Michigan, the township cemetery features a field of crosses, each dedicated to a different war.[56] And in Sunbury, Ohio, a recently built expanse of crosses commemorates soldiers lost to the War on Terrorism.[57]

Finally, the "battle cross"—another tradition that first rose to prominence during World War I—is another common feature of U.S. war memorials. Fashioned by placing a helmet atop a rifle stuck in the ground or propped up by a pair of boots, soldiers used these formations as an ad hoc way of marking the spot where a comrade-in-arms fell in battle.[58] Forming the vague outline of a Latin Cross, battle crosses can be found today in more than 50 veterans memorials

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[54] The Nat'l War Memorial Registry, *Mount Morris Field Of Crosses*, http://www.nationalwarmemorialregistry.com/joomla/war-memorial-registry-search/new-york/mount-morris-field-of-crosses.

[55] The Nat'l War Memorial Registry, *Highland Cemetery Veterans Memorial Field Of Crosses*, http://www.nationalwarmemorialregistry.com/joomla/war-memorial-registry-search/kansas/highland-cemetery-veterans-memorial-field-of-crosses.

[56] The Nat'l War Memorial Registry, *Constantine Field Of Crosses War Memorial*, http://www.nationalwarmemorialregistry.com/joomla/war-memorial-registry-search/michigan/constantine-field-of-crosses-war-memorial.

[57] The Nat'l War Memorial Registry, *Ohio Fallen Heroes Field of Crosses Memorial*, http://www.nationalwarmemorialregistry.com/joomla/war-memorial-registry-search/ohio/ohio-fallen-heroes-field-of-crosses-memorial.

[58] Kathleen Golden, The Battle Cross, THE SMITHSONIAN (May 21, 2015), http://americanhistory.si.edu/blog/battlefield-cross.

nationwide,[59] including the National D-Day Memorial in Bedford, Virginia;[60] in Ansted, West Virginia;[61] and in Lewisville, North Carolina.[62] Often, these memorials depict soldiers kneeling before the battle cross, such as at the memorials in Del City, Oklahoma and Priceville, Alabama.[63]

All of these images and memorials make clear that when a cross is used as a symbol to honor the men and women who fight for our country, it assumes a cultural resonance beyond its religious meaning. The Bladensburg Peace Cross thus stands in good company—one in a tradition centuries-long and the entire country wide.

C. The Bladensburg Memorial's History And Context Confirm Its Constitutionality.

Our country's deep-seated practice of using religious imagery in public war memorials—and crosses specifically—calls the conclusion of the court below strongly into question.

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[59] *See* The Nat'l War Memorial Registry, http://www.nationalwarmemorialregistry.org/joomla/war-memorial registrysearch/advancedsearch?cat_id=0&view=advsearch (select "battle field crosses" in "type of memorial").

[60] The Nat'l D-Day Memorial, https://www.dday.org/introduction.html.

[61] The Nat'l War Memorial Registry, *New Haven Veterans' Memorial Battlefield Cross*, http://www.nationalwarmemorialregistry.com/joomla/war-memorial-registry-search/west-virginia/new-haven-veterans-memorial-battlefield-cross.

[62] The Historical Marker Database, *Battle Cross*, https://www.hmdb.org/marker.asp?marker=55908.

[63] Waymarking.com, *Fallen Soldier Battle Cross - Del City, OK*, http://www.waymarking.com/waymarks/WMBTCN_Fallen_Soldier_Battle_Cross_Del_City_OK; see also Al Whitaker, *Priceville Honors Veterans, Dedicates New Memorial Park*, WHNT News (Nov. 12, 2012), https://whnt.com/2012/11/11/priceville-honors-veterans-dedicates-new-memorial-park/.

When the specific origins and current context of the Bladensburg memorial are added to the calculus, the need for reversal becomes even more plain. Rather than conveying government endorsement of religion, the Bladensburg Peace Cross was built with private funds on then-private land, was conceived for nonreligious purposes, and has been used exclusively throughout its long history for the secular purpose of honoring soldiers who died in World War I.

First, the record is clear that the memorial's original purpose was not to proselytize or advance a particular religious sect, but rather to honor 49 local soldiers who died overseas. Am. Legion Pet. 5-6. The monument was built almost 100 years ago by the American Legion and a group of mothers, as a memorial and type of substitute gravestone for these fallen soldiers. *Id.* The cross shape was chosen specifically to "mirror[] the custom in Europe during World War I where the Cross became the principal grave marker in cemeteries where soldiers were buried." Comm'n App. 98 (Neimeyer, J., dissenting from denial of rehearing *en banc*). The memorial is also an example of a monument with both religious and secular elements: It is inscribed with the words "valor, endurance, courage, and devotion," and contains a large plaque listing the names of those it was built to honor. Am. Legion Pet. 5-6.

All of these factors make clear that the Peace Cross's original purpose was not "to promote a Christian message," *Salazar*, 559 U.S. at 715 (plurality op.), but to allow the "nonreligious aspects" of the cross symbol "to predominate," *Van Orden*, 545 U.S. at 701 (Breyer, J., concurring); cf. *Trunk*, 629 F.3d at 1101 (holding cross monument violated Establishment Clause where primary objective was "to create a park worthy of this magnificent view, and worthy to be a setting for the symbol of Christianity.").

A *second* factor cuts in favor of the Bladensburg memorial's constitutionality as well: time. In both *Van Orden* and *Salazar*, this Court emphasized that when a passive monument with religious elements has stood without controversy for decades, the best explanation is that the monument—properly understood within its broader context—has not been viewed as displaying a predominantly religious message. See *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring) (explaining that 40 years without challenge to the Ten Commandments monument indicated "that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, [or] primarily to promote religion over nonreligion"); *Salazar*, 559 U.S. at 716 (plurality op.) ("Time also has played its role. The cross had stood on Sunrise Rock for nearly seven decades . . . [and thus] the cross and the [secular] cause it commemorated had become entwined in the public consciousness."). The Establishment Clause challenge decided the same day as *Van Orden*, by contrast, was successful in part because the Ten Commandments display engendered controversy almost immediately after it was hung on the courthouse wall. *McCreary Cty.*, 545 U.S. at 852.

Here, the Bladensburg memorial has stood for decades—nearly a century—without controversy. It has also been used throughout its history for secular purposes, not religious, including as a site for events on secular holidays commemorating fallen soldiers and veterans, like Memorial Day and Veterans Day. Am. Legion Pet. 7. Ninety-three years without controversy or legal challenge counsels strongly in favor of constitutionality. Indeed, any approach to the Establishment Clause that "would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the

Establishment Clause seeks to prevent." *Town of Greece*, 572 U.S. at 577(citing *Van Orden*, 545 U.S. at 702-04); see also *Salazar*, 559 U.S. at 726 (Alito, J., concurring) ("demolition of this venerable, if unsophisticated, monument would also have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage").

Third, the secular purpose and message of this memorial has become more apparent over its near-century-long history than when it was first built. The community has surrounded the World War I Peace Cross with other commemorative monuments—a Pearl Harbor Memorial, a Battle of Bladensburg Memorial, a September 11 Memorial Garden, and others. Am. Legion Pet. 7-8. None of those monuments use religious imagery. *Id.* This more recent history underscores that the local community recognizes the World War I monument as commemorative, not religious, and that the cross's religious symbolism is understood in context with the area's overall civic purpose of honoring and remembering the dead.

Just as in *Van Orden*, the passive monument challenged here was originally funded by a private civic organization, was designed for a primarily secular purpose, stood unchallenged for decades, and sits on public land near other entirely secular monuments. 545 U.S. at 681-82 (plurality op.). These factors weigh at least as heavily now as they did thirteen years ago. This Court should reach the same result it did then, but with clear direction about the importance of this history and context when considering the values the Establishment Clause is meant to protect.

* * *

For nearly a century the Peace Cross has stood as a powerful reminder of the sacrifice made by 49 local soldiers who gave their lives overseas in one of the worst wars in our nation's history. The Court should reverse the lower court's call for its destruction. As its place in our national tradition and broader cultural context make clear, the Bladensburg memorial honors both the service members it was built to honor, and the constitutional ideals—including those in the First Amendment—they died to defend.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

Patrick Morrisey
Attorney General

Lindsay S. See
Solicitor General
Counsel of Record

Zachary A. Viglianco
Assistant Attorney General

OFFICE OF THE WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
lindsay.s.see@wvago.gov
(304) 558-2021

Counsel for Amicus Curiae
State of West Virginia

[Additional counsel listed on next page]

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STEVE MARSHALL
Attorney General
State of Alabama

KEVIN G. CLARKSON
Attorney General
State of Alaska

MARK BRNOVICH
Attorney General
State of Arizona

LESLIE RUTLEDGE
Attorney General
State of Arkansas

CYNTHIA H. COFFMAN
Attorney General
State of Colorado

PAMELA J. BONDI
Attorney General
State of Florida

CHRISTOPHER M. CARR
Attorney General
State of Georgia

LAWRENCE G. WASDEN
Attorney General
State of Idaho

CURTIS T. HILL, JR.
Attorney General
State of Indiana

DEREK SCHMIDT
Attorney General
State of Kansas

ANDY BESHEAR
Attorney General
Commonwealth of
Kentucky

JEFF MARTIN LANDRY
Attorney General
State of Louisiana

BILL SCHUETTE
Attorney General
State of Michigan

JIM HOOD
Attorney General
State of Mississippi

JOSH HAWLEY
Attorney General
State of Missouri

TIM FOX
Attorney General
State of Montana

DOUG PETERSON
Attorney General
State of Nebraska

WAYNE STENEHJEM
Attorney General
State of North Dakota

MICHAEL DEWINE
Attorney General
State of Ohio

MIKE HUNTER
Attorney General
State of Oklahoma

PETER F. KILMARTIN
Attorney General
State of Rhode Island

ALAN WILSON
Attorney General
State of South Carolina

MARTY JACKLEY
Attorney General
State of South Dakota

HERBERT H. SLATERY, III
Attorney General &
Reporter
State of Tennessee

KEN PAXTON
Attorney General
State of Texas

SEAN REYES
Attorney General
State of Utah

MARK R. HERRING
Attorney General
Commonwealth of
Virginia

BRAD SCHIMEL
Attorney General
State of Wisconsin

PETER K. MICHAEL
Attorney General
State of Wyoming